IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MZIRAY, J.A., KWARIKO, J.A., And SEHEL, J.A.)

CRIMINAL APPEAL NO. 194 OF 2014

MFAUME SHABAN MFAUME.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Kaduri, J.)

dated the 14th day of April, 2014
in
(DC) Criminal Appeal No. 64 of 2004

JUDGMENT OF THE COURT

13th & 29th May, 2019

KWARIKO, J.A.:

The appellant and 10 others were arraigned before the District Court of Temeke with the offence of robbery with violence contrary to sections 285 and 286 of the Penal Code Cap. 16 of the Revised Laws. It was alleged that, on the 24th day of August, 2001 the appellant and others stole a 21-inch TV set valued at Tshs 250,000/= the property of one Fadhili Salum and that they used violence to the said Fadhili Salum and one Khatibu Kombo in order to obtain the said property. The appellant denied the charge where at the end of the trial he was found

guilty, convicted and sentenced to thirty (30) years imprisonment. His appeal before the High Court of Tanzania was not successful.

Undaunted by the double failure, the appellant has come on appeal before this Court on eight grounds of complaint which we have condensed into three grounds as follows: **one,** that the evidence of visual identification was not sufficient against the appellant; **two,** that the appellant was convicted on the weakness of the defence evidence and **three,** that the prosecution case was not proved beyond reasonable doubt against the appellant.

It is worth noting here that the proceedings of the two courts below are at large. The only record available in this case is the judgments of the two courts below. There is no charge sheet, proceedings of the trial court and the exhibits tendered in evidence. In the affidavit sworn by the Deputy Registrar of the High Court of Tanzania at Dar es Salaam, Crisencia Kisongo it is shown that efforts to locate the missing records in the court registry proved futile. Not even the appellant, the respondent Republic, the trial court and the prison office who were contacted were in possession of the missing record. It is for this reason that we are unable to recapitulate the facts of the case

from the evidence adduced at the trial. On its part, the High Court entertained the appeal on reliance to the trial court's judgment only.

At the hearing of the appeal on 13/5/2019, the appellant appeared in person, unrepresented. The respondent Republic was represented by Ms. Grace Mwanga assisted by Ms. Aziza Mhina, both learned State Attorneys.

When the appellant was called upon to argue his appeal, he only adopted his grounds of appeal and opted for the State Attorney to respond after which he would put his rejoinder, if any.

On her part, Ms. Mwanga contended that in the absence of the record of evidence, they would not properly argue the grounds of appeal. In the same vein evaluation of the evidence for justifiable decision was impossible, she submitted. That, the two judgments of the lower courts were not sufficient to decide the case. In the circumstances, the learned State Attorney implored the Court to exercise its revisional powers under section 4 (2) of the Appellate Jurisdiction Act [CAP 141 R.E. 2002] (the AJA) to nullify the proceedings of the two courts below, quash the conviction and set aside the sentence imposed

on the appellant. She further urged us to order the release of the appellant from prison because he has been there for so long; about 16 years.

Following the respondent's stance, the appellant had nothing else to say in rejoinder, he concurred with the submission of the learned State Attorney.

We have gone through the court record, the grounds of appeal and the submissions by the parties in respect of the appeal. It is now incumbent upon us to decide the appeal. Having pondered over the matter, we are in agreement with the learned State Attorney that in the absence of the record of evidence, it is impossible for us to decide the grounds of appeal without offending the ends of justice. That can only be done by evaluating the evidence tendered at the trial. We are of the view that to decide the appeal without having the opportunity to revisit the evidence tendered at the trial would amount to not according the appellant sufficient opportunity of being heard which is a right safeguarded by the United Republic of Tanzania Constitution, 1977; Article 13 (6) (a) thereof provides in the official version thus:

"(6) Kwa madhumuni ya kuhakikisha usawa mbele ya sheria, Mamlaka ya Nchi itaweka taratibu zinazofaa au zinazozingatia misingi kwamba–

(a) wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi wa mahakama au chombo kinginecho kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu, na pia haki ya kukata rufaa au kupata nafuu nyingine ya kisheria kutokana na maamuzi ya mahakama au chombo hicho kinginecho kinachohusika."

Literally translated, the sub-article in English reads:

"(6) To ensure equality before the law, the state authority shall make procedures which are appropriate or which take into account the following principles, namely:

(a) *When the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned."*

Therefore, we are of the decided view that the High Court erred to entertain and decide the appeal in the absence of the trial court's proceedings. Similarly, we are unable to comment anything concerning the trial court's judgment because the evidence upon which it was based is missing. The rightful course to take as correctly urged by the learned State Attorney is to invoke our revisional powers under section 4 (2) of the AJA as we hereby do and nullify the proceedings and judgments of the two courts below and quash the conviction and sentence imposed on the appellant.

Having quashed the proceedings of the two courts below and set aside the sentence meted out to the appellant, what then should be the way forward? This question has greatly tasked our minds. We have considered the peculiar circumstances in this matter particularly the facts that the appellant has been incarcerated for about sixteen (16) years from the date of conviction and sentence, thereby serving a substantial part of his sentence, that the efforts to trace the record of proceedings from the court and other stakeholders have proved futile and that a retrial of the appellant cannot be ordered without occasioning injustice. All considered, we think justice will triumph if the appellant is set free. We thus order the immediate release of the appellant Mfaume

Shaban Mfaume from prison unless he is continually held for some other lawful cause.

DATED at **DAR ES SALAAM** this 20th day of May, 2019.

R. E. S. MZIRAY
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

B.A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL